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December 5, 2001

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Magalie Roman Salas, Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Dkt No. 99-200: Ex Parte Comments of Leap Wireless International

Dear Ms. Salas:

We write on behalf of Leap Wireless International, Inc., in connection with the above-captioned *Numbering Resource Optimization* proceeding. Leap, with its Cricket subsidiaries (collectively "Leap"), is responding to public reports that the Commission intends to act on the outstanding issues in this proceeding. Leap hopes that the Commission's actions will take into account the needs and concerns of carriers such as itself, and address the numbering-related problems that have diminished Leap's ability to bring competitive new service to the public.

Leap is a PCS licensee, and a small business under the Commission's rules.¹ Leap launched its first market in 1999. On September 30, 2001, just two years later, Leap provided service to more than 724,000 people and it currently offers service in 32 markets over 18 states. The reason for this dramatic growth is simple: Leap provides a unique value that reaches out and meets the needs of a previously underserved mass-market demographic.

Under the Cricket brand name, Leap provides unlimited, "all you can talk," local service for a flat monthly fee of about \$30 - \$35, depending on the market. The low cost and predictability of this flat-rated pricing scheme, and the quality and reliability of Leap's state-of-the-art digital network cause the Cricket offering to resemble landline service in everything except the landline's immobility. Not surprisingly, consumers flock to the Cricket service

¹ See AirGate Wireless L.L.C. and Cricket Holdings, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 11,827 (WTB 1999), *aff'd*, Applications of AirGate Wireless, L.L.C., et al., FCC File Nos. 0000002035, et al. *Memorandum Opinion and Order* (rel. July 27, 2000).

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wherever it is available. Thus, Leap has consistently experienced growth rates two to four times faster than more traditional wireless carriers.

Because Leap is an upstart carrier that is continually entering new markets, and because of the extreme popularity of its service offering, Leap has often had problems obtaining a sufficient supply of telephone numbers. In Phoenix, for example, Leap found itself with 90,000 numbers when it had a run rate of almost 30,000 numbers per month. In Pittsburgh, the situation became even more dire as Leap ran out of area code 412 numbers before it was able to obtain additional codes. This had the effect of denying the Cricket service to consumers for a period of time.²

State and federal rationing schemes are designed with the penetration rates of existing carriers in mind. Under the Commission's "utilization threshold," carriers must use 60 percent of their existing number supply before they apply for more. And states in some cases are allowed to add their own rationing requirements – ranging from higher utilization thresholds to lotteries. But these rules, designed for typical carriers, pose a severe burden for non-traditional carriers such as Leap. Particularly in the first year or two after Leap has entered a market, it requires numbers at least at twice the rate of most carriers. In addition, an incumbent has a large stockpile of numbers, both used and unused, so that it still retains a hefty supply of unused numbers once it reach the 60 percent utilization threshold.³ Paradoxically, then, these rules tend to disfavor the very carriers that the Commission should seek to encourage: innovative new entrants, such as Leap.

The Commission should carefully consider the policy implications of its numbering rules. It is fundamental to the Commission's mandate that it promote the availability of telecommunications services to the public, and that it facilitate the full exploitation of radio spectrum for consumer use.⁴ But when a carrier is prevented from obtaining telephone numbers, it is prevented from providing service. The Commission should therefore craft its rules to ensure

² See Letter from Jeffrey J. Carlisle, Senior Deputy Chief, Common Carrier Bureau, to William S. Carnell, Esq., Counsel to Leap Wireless International, DA 01-2164 (CCB rel. Sept. 14 2001).

³ For example: Assume that Leap and an incumbent experience subscriber growth at the same rate – 10,000 per month. Leap has 30,000 numbers, and the incumbent has 150,000. When Leap reaches the 60 percent utilization threshold, it has 12,000 numbers left – only slightly more than one month's growth, and not enough to last through the 66 days or more that it takes to get new numbers. But when the incumbent reaches 60 percent, it still has 60,000 numbers left – six month's worth, and plenty to last until it gets more.

⁴ See, e.g., 47 U.S.C. § 151 (FCC established "for the purpose of . . . mak[ing] available, so far as possible . . . wire and radio communication service"). See also, e.g., 47 U.S.C. § 309(j)(3) (directing FCC to "promote . . . objectives" including the "development and rapid deployment of new technologies, products and services for the benefit of the public," and the "intensive use of the electromagnetic spectrum").

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that adequate quantities of telephone numbers can be obtained by carriers – particularly rapidly growing new entrants – who need them.

To this end, Leap believes that the Commission must change its rules provide an effective means by which carriers with genuine need can obtain phone numbers. While the Commission should continue to allow case-by-case relief where appropriate, it should also adopt a bright-line “safe harbor” or “safety valve” rule, that sets out specific, verifiable circumstances under which relief will be granted. Four principles should guide the Commission’s search for an effective safety valve:

- **An effective safety valve must be automatic, not discretionary.** Carriers need to know when, and whether, they will be able to obtain phone numbers. Likewise the Commission should seek to eliminate the uncertainty and delay that inevitably accompanies administrative discretion. While a decisionmaker might, in extraordinary circumstances, challenge the factual underpinnings of a safety valve petition, the Commission should establish a bright-line rule that, under a specific and verifiable set of facts, establishes without doubt whether relief is warranted.
- **An effective safety valve must be administered so as to deliver near-immediate results.** If a carrier’s sale rate indicates that it will run out of numbers within a few months - even if the carrier has not reached the 60% utilization threshold - the carrier needs new numbers almost immediately. This is because it takes 66 days for newly-assigned numbers to become LERG-effective and thus available for use by a carrier – plus whatever time it takes to apply for and receive the numbers from NANPA or state numbering authorities.⁵
- **An effective safety valve must provide numbers to carriers in genuine need.** This almost goes without saying, as the Commission has reiterated the principle on many occasions.⁶ But the Commission should be careful to establish a methodology, and a specific standard or threshold within that methodology, that provides phone numbers to carriers who need those numbers to provide service to the public.
- **An effective safety valve must address state and federal rationing schemes.** The Commission has prescribed its own number rationing scheme, most saliently the 60 percent utilization threshold, and has allowed many states to prescribe additional requirements, ranging from higher utilization thresholds to phone number lotteries.

⁵ While it is sometimes possible to “pre-load” numbers prior to their full LERG effectiveness, doing so causes a significant denigration to service quality until the numbers become fully LERG effective.

⁶ See, e.g., Numbering Resource Optimization, *Second Report and Order, Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 16 FCC Rcd 306, 334 ¶ 61 (rel. Dec. 29, 2000) (“Under no circumstances should consumers be precluded from receiving telecommunications services of their choice from providers of their choice for a want of numbering resources”).

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Particularly in the wireless context, however, where market boundaries do not follow state lines, numbering resources are a national concern and the Commission should provide a national safety valve that applies equally to all such rationing schemes.

In order to accomplish these objectives, the FCC should issue rules requiring any agency that allocates numbering resources under delegated authority – whether NANPA or a state PUC – to grant additional numbering resources to any carrier that makes the following “safety valve” showing:

- A carrier demonstrates that it will exhaust its numbering resources in a rate center within 90 days.⁷
- This showing must be based on growth and penetration rates that vary no more than 15 percent from the carrier’s historical penetration rates in reasonably comparable markets.⁸
- The FCC should further require any such agency acting on delegated authority to provide such safety valve relief within five business days of the carrier’s filing.

After a carrier has made a “safety valve” showing, the authority responsible for granting codes in the applicable jurisdiction should grant the carrier sufficient numbers to meet its demonstrated need – even if that requires the grant of more than one block of codes. By the same token, a carrier that demonstrates that it has less than 90 days supply of codes in a market – through historical penetration rates in reasonably comparable markets – should be granted additional codes even if the carrier has not yet launched service in the market. Indeed, for Leap, the remarkable growth it experiences in the first six months after market launch puts tremendous pressure on its numbering resources.

Of course, this bright-line safety valve will not reach every instance where relief should be granted. A carrier may be unable to provide the required historical analysis because it is new entrant. Or it might have reason to believe that because of a new promotion or some other factor it will experience a sudden increase in demand. Discretionary relief may be warranted in these cases, and the existence of this bright-line safety valve should not preclude such relief where a carrier is unable to make a safety valve showing. Just as with the “safe

⁷ Note that a carrier facing exhaust within 90 days is in a severe crisis: numbers, once issued, do not become LERG effective – and usable – for 66 days, so a carrier facing exhaust within 90 days has only 24 days to obtain more numbers.

⁸ The test of what is “reasonably comparable” should be sufficiently flexible to accommodate a carrier such as Leap that is rapidly entering new markets. For example, Leap won the right to acquire Houston (5.1 million 2001 POPS) in Auction #35, but the largest markets it has launched to date are Phoenix (3.5 million 2001 POPS), Denver (2.8 million 2001 POPS) and Pittsburgh (2.5 million 2001 POPS). The reasonably comparable test should not be so strict that Leap cannot rely on its previous market penetration experience in launching a new market such as Houston.

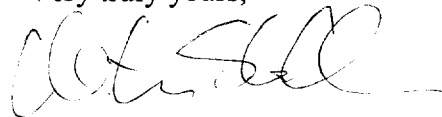
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harbors” provided in securities and other areas of the law, the “safety valve” should complement, not replace, discretionary relief where appropriate

Number exhaustion is against the public interest, as it restricts consumers’ ability to obtain and enjoy new and innovative telecommunications services. Leap strongly believes that an objective and non-discretionary safety valve mechanism, based on verifiable data, is essential to providing meaningful relief to carriers facing imminent number exhaustion. And it further believes that the proposed mechanism is best suited to accomplish that objective.

Thank you for your consideration of this matter. The original and one copy of this letter are enclosed for submission as an ex parte presentation in CC Docket No. 99-200.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'J. F. Barker', with a horizontal line extending to the right.

James F. Barker
William S. Carnell
of LATHAM & WATKINS

cc: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Kyle Dixon
Bryan Tramont
Jordan Goldstein
Sam Feder